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No. 98-404

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

UNITED STATES DEPARTMENT OF COMMERCE,
Petitioner,

v.

UNITED STATES HOUSE OF REPRESENTATIVES,
Respondent.

On Writ Of Certiorari To The United States District Court for the District of Columbia

BRIEF OF *AMICUS CURIAE* THE JAPANESE AMERICAN CITIZENS LEAGUE IN SUPPORT OF PETITIONER

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MOTION OF THE JAPANESE AMERICAN CITIZENS LEAGUE FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

The Japanese American Citizens League ("JACL") respectfully moves for leave to file the attached *amicus curiae* brief in support of Petitioner the United States Department of Commerce.

JACL has requested consent from both Petitioner United States Department of Commerce and Respondent United States House of Representatives to file this brief, and thus far has received consent from Respondent United States House of Representatives.

Petitioner Department of Commerce seeks review to overturn an order enjoining any use of statistical sampling in the decennial census to determine the population for purposes of congressional apportionment. The use of statistical sampling would dramatically increase the accuracy of the results of the year 2000 census. The methodology that otherwise would be employed, as urged by Respondent, would significantly and disproportionately undercount minorities, including Asian Americans. Such undercounting creates a risk of congressional malapportionment. The implementation of statistical sampling, as urged by both Petitioner Department of Commerce and JACL, would result in a census figure which more accurately and fairly reflects the number of minorities in the population, and thus would reduce the risk of congressional malapportionment.

JACL has a strong interest in the outcome of this case. Comprised of over 23,000 members, JACL is committed to ending discrimination against people of Japanese ancestry. As part of a minority group which was undercounted in the last census, JACL has a direct interest in having the year 2000 census conducted in a manner which will accurately count its members. An accurate count is vital for fair congressional apportionment and for other ancillary purposes, including the allocation of federal funds, for which the census data is used.

In the attached brief, JACL argues the need for this Court to decide that the Census Act permits the Department of Commerce to use statistical sampling to determine the population for purposes of congressional apportionment. In holding that the Census Act prohibits such use of statistical sampling, the district court ignored the Constitution's directive for an accurate census and the plain language of the Census Act. JACL believes that the attached brief will help the Court assess the significance of the issues raised by the district court's ruling.

Accordingly, *amicus* respectfully requests that this motion to file an *amicus curiae* brief in support of Petitioner be granted.

Dated: October 6, 1998

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INTERESTS OF *AMICUS CURIAE*

This *amicus curiae* brief is submitted by the Japanese American Citizens League ("JACL")[1]. The JACL was founded in 1929 to fight discrimination against people of Japanese ancestry. It advances its mission through programs of citizenship, leadership, education, advocacy, and redress. It is the largest and one of the oldest Asian Pacific American organizations in the United States. The JACL is associated with a number of legislative accomplishments, including the passage of the naturalization act for Asian Americans (McCarran Act of 1952) and redress for Japanese Americans forced into prison camps during World War II (Civil Liberties Act of 1988).

The JACL has a vital interest in constitutional issues affecting its members, including equal protection and equal representation. As a representative of a minority group undercounted in the past decennial census, the JACL has a compelling interest in having the year 2000 census conducted in a manner that will provide a fair and accurate count of its members, as well as all other Americans. An accurate count is vital for the purpose of apportionment and for other important ancillary purposes, including the allocation of federal funds, for which the census data is used. Because the methodology urged by the Department of Commerce and the Bureau of the Census is designed to remedy the differential undercount of past censuses, the JACL submits this brief in support of Petitioner Department of Commerce.

SUMMARY OF ARGUMENT

Under the Constitution, no member of a minority group may be counted as a mere fraction of a person. Yet this would be the inevitable result of affirmance of the District Court's order in this case.

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1. Pursuant to Supreme Court Rule 37.6, JACL represents that its counsel authored this brief in whole, and no person or entity other than JACL or its counsel made a monetary contribution to the preparation or submission of this brief.

The Constitution provides that Representatives shall be "apportioned among the several States . . . according to their respective Numbers." U.S. Const. art. I, § 2, cl. 3, *amended by* U.S. Const. amend. XIV. This clause originally provided that these "Numbers" were to be determined according to the "whole Number of free Persons" and "three fifths of all other Persons." Well over a century ago, the Fourteenth Amendment was passed to rectify this injustice, and changed the definition of "respective Numbers" for the purpose of apportionment to include "the whole number of persons in each State." U.S. Const. amend. XIV.

The status of minority persons as "whole persons" is threatened by the District Court's holding barring the use of recognized sampling methods in the conduct of the decennial census. *See U.S. House of Representatives v. U.S. Dep't. of Commerce*, 11 F.Supp.2d 76 (D.D.C. 1998). The Bureau of the Census, the lower courts and even this Court have recognized that the decennial census has regularly undercounted members of minority groups. The effect of such systematic undercounting is that each such minority person is counted as a fraction of a person. While the mechanism that results in the undercounting is different than what it used to be — no longer are the numbers of certain persons counted and then multiplied by three-fifths — the impact of the undercounting is no less real and no less pernicious. Although percentages higher than three-fifths may be seen as benign in comparison, they nevertheless fail to meet the constitutional requirement of equal representation.

Systematic undercounting of minority groups does not comport with the Constitutional command that "actual Enumeration" shall be made. U.S. Const. art. I, § 2, cl. 3 (emphasis added). It does not comport with the command of the Fourteenth Amendment that for the purposes of apportionment the count shall include "the whole number of persons in each State." It does not comport with the plain language of the Census Act, which allows the "use of sampling procedures and special surveys." 13 U.S.C. § 141(a).

Every American, regardless of race, has the right to be recognized by the government and counted for the purposes of apportionment. This Court should reject any attempt to ignore the plain Constitutional intent that the census be conducted as accurately as possible, and reject a construction of the Census Act which is both unreasonable on its face and would result in a discriminatory census count.

ARGUMENT

I.

AMERICANS OF ASIAN DESCENT, HAVING BEEN THE SUBJECT OF DISCRIMINATION UNDER COLOR OF LAW, HAVE A COMPELLING INTEREST IN ENSURING EQUAL REPRESENTATION.

Americans of Asian heritage are no strangers to discrimination under color of law. *See, e.g., People v. Hall*, 4 Cal. 399 (1854) (reversing murder conviction on the grounds that the testimony of Chinese witnesses was inadmissible against a free white citizen); *People v. Brady*, 40 Cal. 198 (1870) (holding ban on Chinese testimony constitutional under the 14th Amendment and the California Constitution); *In re Ahg Yup*, 1 F. Cas. 223, 224 (C.D. Cal. 1878) (holding that Chinese immigrant was ineligible for naturalization); *Fong Yue Ting v. United States*, 149 U.S. 698, 725 (1892) (upholding Chinese Exclusion Act); *Chae Chan Ping v. United States*, 130 U.S. 581, 610-11 (1889) (limiting ethnic Chinese from returning to United States after leaving country); *In re Saito*, 62 F. 126 (D. Mass 1894) (holding that Japanese were of the "Mongolian race" and therefore subject to exclusion from naturalization for the same reasons as Chinese); *Bessho v. United States*, 178 F. 245, 248 (4th Cir. 1910) (upholding immigration act limiting privileges of naturalization of Japanese); *Ozawa v. United States*, 260 U.S. 178, 198 (1922) (upholding the denial of citizenship to Japanese); *Terrace v. Thompson*, 263 U.S. 197 (1923) (upholding California's Alien Land Law which restricted Japanese land

ownership); and *Gong Lum v. Rice*, 275 U.S. 78, 84 (1927) (upholding the "separate but equal" doctrine against an American born girl of Chinese descent).

Perhaps the most striking example of a racially motivated deprivation of rights in the United States in this century occurred when President Roosevelt signed Executive Order 9066, which allowed the internment of Americans of Japanese descent. Exec. Order No. 9066, 3 C.F.R. 1092 (1938-1943). Under this Executive Order, over 120,000 persons of Japanese descent were incarcerated in camps until the end of World War II, including 70,000 United States citizens. The internment was upheld in *Korematsu v. United States*, 323 U.S. 214 (1944), *conviction vacated on writ of coram nobis*, 584 F. Supp. 1406 (N.D. Cal. 1984). There have been enough such blots on American jurisprudence.

Americans of Asian descent include Asian Indian, Cambodian, Chinese, Filipino, Hmong, Japanese, Korean, Laotian, Taiwanese, Thai and Vietnamese. It is the common interest of all Americans of Asian descent that they, as well as all other Americans, be given their basic right of equal representation. That right depends on a fair and accurate census.

II.

THE CONSTITUTION DOES NOT PERMIT DIFFERENTIAL UNDERCOUNTING OF MINORITY GROUPS.

A. The Constitution Requires An Accurate Census, Not Any Particular Methodology.

The purpose of a decennial national census is to ensure that citizens are equally represented in Congress. An inaccurate census is inimical to this purpose, as it gives some citizens and groups of citizens a greater voice in government than others.

The plaintiffs in the action below suggest that the term "actual Enumeration" requires a literal head count. This is not supported by the historical record, the history of the census, or even logic.

Because the historical record is well discussed in other briefs before the Court, it need not be reviewed here. Suffice it to say, there is an absence of support for any claim that the founders were wedded to any particular census methodology. Indeed, the literal language of Art. I, § 2, cl. 3 belies any such claim, since it vests Congress with the authority to conduct the decennial census "in such Manner as they shall by Law direct." "In such manner" is obviously distinct from a command that the census be conducted in some particular manner.

The framers foresaw the need for a census because they knew the country would grow and change. The principle reflected in Article I is that an accurate determination of the population is the only reasonable basis for a fair and honest apportionment to reflect that growth.

While the Constitution allocates to Congress the power to determine the methodology for conducting the decennial census (power which Congress has in turn delegated to the Secretary of Commerce), the power of Congress of necessity has constitutional limitations. Congress does not have the power to institute a methodology which would necessarily result in an **inaccurate** enumeration in violation of the Constitution. Yet, the decision of the lower court appears to find exactly that — that the Census Act forbids the Bureau of the Census from using a methodology which the Bureau of the Census, the National Academy of Sciences, and even Congress' own General Accounting Office have endorsed as appropriate and necessary to prevent a repetition of the severe miscount which took place in the 1990 census.

The only reasonable conclusion is that the Constitution requires the use of the best methods possible in order to achieve the most accurate census possible. That judgment has been made after extensive and careful study by the body

charged with the responsibility of determining the methodology — the Bureau of the Census. Any attempt to subvert the considered, well-reasoned and scientifically sound judgment of the Bureau and to command that it use an inferior technique which guarantees the systematic undercounting of minorities must be considered constitutionally infirm.

B. The Method Of Conducting The Census Has Changed Over Time.

The Constitution did not specify the particular methodology to be used to conduct a census. As a matter of historical fact, the methodology employed in conducting the census has changed over the years. Originally, the count was conducted by United States Marshals. Later, special "enumerators" were hired. More recently, visits to dwellings were largely replaced by mailed census forms, and actual visits were generally limited to cases where the forms were not returned. *See* Bureau of the Census, *Report to Congress — The Plan for Census 2000* at 1 (August 1997) (hereinafter *"The Plan for Census 2000"*).

There apparently never has been a real headcount — the sort of count where everyone is assembled in the town square and ticked off one by one. Rather, the census has been conducted by reference to dwellings, and the census has relied upon a resident who answers for the dwelling. Where a resident could not be contacted, the census has relied upon information provided by neighbors or other informants.

Of course, because the census is based on dwellings, not people, it is prone to error. It tends to overcount the affluent who may have more than one home, or children residing at college. It also tends to miss certain types of people, such as those who have no fixed residence, or whose economic or cultural circumstances lead to more than one family living in a single dwelling, or renters whose dwelling is simply not on the lists used.

Statistical adjustments are thus necessary to correct for these inherent errors, and the use of such techniques is hardly new. *See The Plan for Census 2000* at 23. They were

first used in the 1970 census. In 1970, counters were sent to a sample of houses that were considered vacant and the count found that a percentage of them were in fact occupied. This data was then used to extrapolate how many people actually lived in the rest of the nation's presumed-to-be vacant dwellings, and an appropriate adjustment was made to correct for that particular undercount. *Id.* Some form of statistical adjustment has been used in every census since 1970.

C. Without Statistical Sampling, The Census Will Differentially Undercount Minorities.

According to estimates, the most recent census in 1990 produced a severe miscount, with some 8.4 million Americans not counted, and some 4.5 million counted twice. Those missed were disproportionately minorities; those counted twice were disproportionately non-Hispanic whites.

According to the Bureau of the Census, the 1990 census missed 2.3% of Asians and Pacific Islanders, 4.4% of African Americans, 5% of Hispanics, and 12.2% of American Indians living on reservations, but only 0.7% of non-Hispanic whites. *The Plan for Census 2000* at 4. Unless the Bureau of the Census is permitted to use statistical sampling, a similar undercount in the year 2000 census is inevitable.

As the lower court acknowledged: "[U]ndercounting of certain groups relative to others, known as the 'differential undercount,' raises the possibility of congressional malapportionment, as jurisdictions with large numbers of undercounted persons may have a greater share of the total population than the census figures suggest." 11 F.Supp.2d at 79-80. In fact, since the distribution of minorities, and thus the undercount, is known to vary significantly by state, the undercount does more than raise "the possibility of congressional malapportionment" — it virtually guarantees it.

III.

THE CENSUS ACT, READ CORRECTLY, PERMITS THE USE OF A STATISTICAL SAMPLING TECHNIQUE TO SUPPLEMENT PRIOR METHODS.

A. The Relevant Portion Of The Census Act Permits Statistical Sampling.

The Constitution grants Congress the authority to conduct a census. U. S. Const. art. I, § 2, cl. 3. Congress has, under the Census Act, delegated its authority to the Secretary of Commerce. 13 U.S.C. § 1 *et seq.*

The Census Act contains a single specific provision concerning the methodology which may be used to conduct the decennial census, Section 141(a). Section 141(a) provides in relevant part: "The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population . . . in such form and content as he may determine, including the use of sampling procedures and special surveys."

Accordingly, under the plain language of the only statute which speaks specifically to the authority of the Secretary of Commerce to conduct the decennial census and the methodology which may be used, sampling is permitted.

In this lawsuit, it appears that Congress, or a certain segment thereof, seeks to utilize this Court to undermine the authority that Congress previously delegated to the Secretary of Commerce to use sampling procedures and special surveys consistent with the goal of conducting an accurate census. If indeed Congress believes that it has the authority to mandate a census procedure that will result in an inaccurate count, then it should amend the Census Act to withdraw the authority it previously granted to the Secretary to use sampling and statistical techniques.

B. Substantial Authority Supports An Interpretation Of The Plain Language Of The Census Act As Permitting Statistical Sampling.

As the lower court noted, many prior rulings support the conclusion that sampling is permitted. *See City of New York v. U.S. Dep't of Commerce*, 34 F.3d 1114, 1124-25 (2d Cir. 1994), *rev'd on other grounds, sub nom. Wisconsin v. City of New York*, 517 U.S. 1 (1996); *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980); *Young v. Klutznick*, 497 F. Supp. 1318 (E.D. Mich 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981). Rather than follow the sound logic of these decisions, the lower court has simply rejected this authority.

Consistent with established precedent and the Constitution, the Department of Commerce and the Bureau of the Census take the position that the Census Act permits statistical sampling. This Court previously stated that "so long as the Secretary's conduct of the census is 'consistent with the constitutional goal of equal representation,' it is within the limits of the Constitution." *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) (citations omitted).[2]

Statistical sampling is directed precisely to accomplishing the constitutional goal of equal representation. Therefore, not only is the Secretary's proposed plan consistent with the Constitution, but the necessary implication is that the knowing use of an alternative census methodology which undercounts minorities is improper and offends the Constitution.

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2. There are at least two distinct differences from the issues presented to the Court in *Wisconsin* in regard to the 1990 Census. First, the presently proposed sampling technique represents a significant improvement from that which the then Secretary declined to use to adjust the 1990 census, and all authoritative sources agree with remarkable unanimity that this technique would result in a considerably more accurate census count. Second, in the present case the Secretary supports the technique, and the Court is being asked to deny the Secretary the discretion it previously approved.

IV.

THE DECISION OF THE DISTRICT COURT DOES NOT WITHSTAND SCRUTINY.

A. The Lower Court's Statutory Construction Raises Serious Constitutional Problems.

In its decision, the District Court for the District of Columbia avoided consideration of the constitutional right of citizens to an accurate census. By ignoring the Constitution, the lower court committed prejudicial error. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 466 (1989).

First, while Article I of the Constitution may give Congress broad authority in regard to the conduct of the census, that authority is necessarily limited to a census methodology that reasonably comports with the command of Article I that there be an "actual Enumeration," and with the command of the Fourteenth Amendment that the count for apportionment be based on "the whole number of persons in each State." The Constitution, therefore, does not permit the census to be conducted using a methodology known to be inaccurate, over a more accurate methodology. The underlying constitutional goal of an accurate census must be met.

Second, the knowing use of an inferior methodology that differentially undercounts minorities denies such minorities their right of equal representation. Strict scrutiny of a classification affecting a protected class is properly invoked where a plaintiff can show intentional discrimination by the Government. *Washington v. Davis*, 426 U.S. 229, 239-245 (1976). Here, the deliberate use of a methodology that is known to result in the undercounting of minorities, where the problem can be avoided, would be nothing less than purposeful discrimination by the Government.

Therefore, the lower court erred in construing the Census Act in a manner that ignores and offends the Constitution.

B. The Lower Court's Statutory Construction Is Wrong.

According to the lower court, two provisions of the Census Act are at issue, sections 141(a) and 195.[3] The lower court notes, but fails to discuss, the significance of the fact that Congress itself has plainly shown that the Census Act does not bar sampling to determine the population for the purposes of apportionment. 11 F.Supp.2d at 82.

In 1997, upon the Department of Commerce's announcement of its plan to utilize statistical sampling in the year 2000 census, Congress attempted to amend 13 U.S.C. § 141(a) to provide that: "notwithstanding any other provision of law, no sampling or any other statistical procedure, including any statistical adjustment, may be used in any determination of population for purposes of apportionment of representatives of Congress among the several States." Supplemental Appropriations and Rescissions Act, H.R. 1469, 105th Cong., 1st Sess. (1997). The bill was vetoed by the President.

Congress had no basis to seek to amend the Census Act to forbid statistical sampling if it was already forbidden. This attempted amendment makes plain that Congress itself understands the Census Act as permitting the procedures now in dispute. Yet the lower court simply ignores this telling evidence of Congress's actual understanding of the Census Act.

The lower court also errs by placing the primacy of its construction on Section 195, when it is Section 141(a)

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3. Section 195 states: "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title."

which specifically and plainly permits sampling with respect to the decennial census: "The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population . . . in such form and content as he may determine, ***including the use of sampling procedures and special surveys.***" (Emphasis added.) It is hard to imagine plainer language.

Further, the lower court errs in suggesting that Section 195 is more specific, and therefore controlling, over Section 141(a). 11 F.Supp.2d at 103 To the contrary, Section 141(a) is clearly the specific section as to the procedures permitted to the Secretary as regards the conduct of the decennial census. Section 195 mandates that statistical procedures "shall" be used for purposes other than the decennial census, and consistent with Section 141(a), simply leaves the use of such procedures discretionary in regard to the decennial census.

The lower court acknowledges that the "except . . . shall" structure of Section 195 is properly read in other sections of the United States Code, as the Department of Commerce contends, but asserts that "[c]ommon sense and background knowledge" dictate that in this instance it must be read differently. *Id.* at 100. This is not proper construction. Rather, common sense as well as correct construction should have informed the lower court that the plain language of Section 141(a) controls, and that Section 195 can and should be read consistently with Section 141(a).

The lower court claims to find support for its analysis in the *absence* of legislative history supporting the use of sampling in regard to counting for apportionment in connection with the 1976 amendment of Section 195. *Id.* at 101. It is not surprising that the lower court found little, because it looked in the wrong place. The plain language of Section 141(a) shows that sampling is permitted, and no legislative history is required to interpret this unambiguous provision.

Remarkably, the lower court also argues that: "It is a cardinal principle of statutory interpretation that dramatic

departures from past practices should not be read into statutes without a definitive signal from Congress." *Id.* at 100-01. The plain language of Section 141(a), however, does not require any interpretation; it plainly states that sampling is permitted in the decennial census.

Furthermore, the lower court makes an incorrect assumption that sampling represents a "dramatic departure." This is wrong for at least two reasons. First, the use of the sampling procedures in the year 2000 census is designed only to supplement the more traditional procedures, not to replace them. Second, statistical adjustments have been applied to past censuses. *See The Plan for the Census 2000* at 23. The procedure proposed by the Department of Commerce and the Bureau of the Census, with the advice and concurrence of the National Academy of Sciences, does not represent a dramatic departure, but simply an evolution.

C. The Decision Of The Lower Court Is Illogical In That It Would Require A Dual Census.

As further evidence of the illogic of the decision of the lower court, there can be no dispute that Section 195 mandates that "the Secretary shall . . . authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." The decennial census is used not only for apportionment, but also for the allocation of billions of dollars in federal funds as well as other purposes. Under the logic of the lower court, the Department of Commerce and Bureau of the Census would be forbidden to use statistical sampling for determining the population for the purposes of apportionment, but required to use statistical sampling (which is not merely feasible, but recommended) for other purposes. In other words, under this logic the census would need to be conducted in two different manners, one for counting for apportionment and one for counting for other purposes. This is obviously an illogical, not to mention costly and burdensome, result.

CONCLUSION

The decennial census will, under the ruling of the lower court, differentially undercount minority groups. Article I of the Constitution mandates an accurate census. The plain language of the Census Act at Section 141(a) specifically permits the Secretary to utilize statistical sampling. Therefore, there can be no justification, Constitutionally or statutorily, for a court-imposed prohibition on a census methodology that will provide for a correct and accurate census. In the year 2000 census, each member of a minority group should be counted as a whole person. Minority groups are entitled to equal representation, and the ruling of the lower court must be overturned.

Respectfully submitted,

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